might be relevant, it was by no means the most relevant of the factors to be considered in deciding on the respondent's application before me. Quite apart from any reference to Mr Sage and subject to any help which counsel might be able to give me in their submissions, there was already much more than sufficient evidence for me to consider the issue of custody. I could not see how an adjournment to file further affidavits about Mr Sage by a former wife of his, and by a Pastor Coyle, could add anything to help the court in deciding on the issue. I therefore refused the application for an adjournment.

Having refused the application for an adjournment, the remaining question before me was what I should do with the summons-in-chambers itself. In view of the stand which he had taken, Mr Cashin made no submission, and I could have dismissed it without further consideration. However, having had the opportunity to peruse the files, I considered as fully as I could the question of the custody of the children before disposing of the application. The principle to be followed by a Singapore court in such matters is set out in s 119 of the Women's Charter (Cap 353, 1985 Ed):

> (1) The court may at any time by order place a child in the custody of his or her father or his or her mother or (where there are exceptional circumstances making it undesirable that the child be entrusted to either parent) of any other relative of the child or of any organization or association the objects of which include child welfare, or to any other suitable person.
>
> (2) In deciding in whose custody a child should be placed, the paramount consideration shall be the welfare of the child and subject to this, the court shall have regard
>
> (a) to the wishes of the parents of the child; and
> (b) to the wishes of the child, where he or she is of an age to express an independent opinion.

The practical application of this principle is not always easy in matrimonial disputes where custody is fought for, and children are almost always the unfortunate objects of their parents' attention: more often than not, a court has to decide on a balance of various competing and conflicting considerations. In the present case, the respondent has alleged that the children fear the petitioner, and the petitioner has himself admitted that he is a strict father, but no adverse or negative factors or characteristics of him have been disclosed. The respondent, on the other hand, stands out from the affidavits as a woman who loves her children dearly, but in her own unconventional way, even to the extent of committing what was clearly a breach of the order of court which gave her care and control of the children. In the circumstances, even without further evidence, and even without the benefit of proper submissions from counsel, I had no doubt that nothing could be more harmful to the children concerned than my transferring their custody back to her again, after it had only recently changed hands; and also that their welfare would be best served by allowing them to settle for some time back in Singapore. Having regard to these considerations, I dismissed the respondent's application.

I should add that I was told by Mr Cashin at the conclusion of the hearing that the respondent's immediate concern was only the question of access. It appeared to me that the most sensible decision I could make would be to direct counsel for both parties to try to sort this out; failing agreement, the parties would have liberty to apply.

Application dismissed.

Solicitors: *Harry Elias & Partners; Murphy & Dunbar*

Reported by *Terence Tan Bian Chye*

Tan Thye Heng v Pan Mercantile (S) Pte Ltd & Anor

HIGH COURT (SINGAPORE) — DISTRICT COURT APPEAL NO 60 OF 1988
CHAO HICK TIN JC
9 OCTOBER 1989

Civil Procedure — Appeal to High Court — Notice of appeal served outside prescribed time — Whether extension of time to be granted by High Court or subordinate court — Subordinate Courts Rules 1986 O 3 r 5 & O 54 rr 1(1), (5), 2, 3(2) — Rules of the Supreme Court 1970, O 3 r 5 — Supreme Court of Judicature Act (Cap 322, 1985 Ed), ss 18(2)(h) & 27(1)

The appellant had filed a notice of appeal against a decision of a district judge. However, the notice of appeal was served out of time on the respondents. The appellant then appealed to the High Court for an extension of time. This was granted by the assistant registrar, whose decision was then appealed against to a judge-in-chambers by the respondents. Counsel for the appellant sought to argue that, based on O 54 r 3(2), the High Court automatically has jurisdiction over an appeal once the notice of appeal is filed. The appellant had also sought to use O 3 r 5 of the Rules of the Supreme Court 1970 to argue that the court could extend the time limits.

Held, allowing the respondents' appeal:

(1) The first issue which the court was asked to address is, is there an appeal where the notice of appeal, though filed, was not served on the respondents within the prescribed time. In the light of O 54 of the Subordinate Courts Rules 1986, before there could be in existence an appeal, the notice of appeal must be both filed and served within the prescribed time. The meaning of appealing is 'giving notice to your adversary of your intention to appeal, by serving upon him a notice of appeal'. Since the notice of appeal was not served within time, there was accordingly no appeal in existence to the High Court.

(2) Under O 3 r 5 of the Subordinate Courts Rules 1986 (the 'SCR'), the subordinate court is empowered to 'extend or abridge the period within which a person is required or authorized by these Rules ... to do any act in any proceedings'. The present application should have been made before the subordinate court in accordance with that Order.

(3) There is nothing in the Rules of the Supreme Court 1970 (the 'RSC') which deals with the subject of appeal from the subordinate court to the High Court. This is governed exclusively by O 54 of the SCR. Counsel for the appellant had sought to argue that, based on O 54 r 3(2), the High Court automatically has jurisdiction over an appeal once the notice of appeal is filed. The court was unable to accept this contention. Rule 3(2) can only come into play if there is in existence an appeal.

(4) Under s 18(2)(h) of the Supreme Court of Judicature Act (Cap 322, 1985 Ed) ('the Act'), the High Court is given a general power to 'enlarge or abridge the time prescribed by any written law for doing any act or taking any proceeding'. Under s 27(1) of the Act, the High Court is given general supervisory and revisionary jurisdiction over all subordinate courts.

(5) The appellant had also sought to use O 3 r 5 of the RSC to argue that the court could extend the time limits. But the High Court should only intervene under such general powers if the circumstances of the case clearly warrant it and where there is no other just and convenient recourse available to the applicant.

(6) As a matter of policy, the court would discourage the taking of a matter to the High Court if the same could just as effectively and conveniently be taken up in a subordinate court. It would also run counter to the objectives of the recent amendments to the Subordinate Courts Act (Cap 321, 1985 Ed) which enhanced the jurisdiction of the subordinate courts.

(7) The application for extension of time should not be made before the High Court. The court would allow the appeal by the respondents.

Cases referred to

1 *Ex parte Saffery* (1877) 5 Ch D 365 (refd)
2 *Gurbachan Singh* v *Seagrott & Campbell (No 2)* [1962] MLJ 370 (refd)
3 *Chong Kueng Ying* v *Lovis Lavagna* [1972] 1 MLJ 180 (refd)
4 *Cheah Teong Tat* v *Ho Gee Seng* [1975] 2 MLJ 149 (refd)

Legislation referred to

Rules of the Supreme Court 1970 O 3 r 5
Subordinate Courts Rules 1986 O 1 rr 1, 5, O 2, O 3 r 5, O 54 rr1(1), (5), 2
Supreme Court of Judicature Act (Cap 322, 1985 Ed) ss 18(2)(h), 27(1)

Loo Dip Seng for the plaintiff/appellant.
MP Rai for the defendants/respondents.

Cur Adv Vult

Chao Hick Tin JC: The appellant, who was the plaintiff in an MC suit, brought the action to recover damages from the defendants on account of the damage caused to his motor vehicle arising out of a motor accident. The district judge who heard the case dismissed the action with costs on 10 October 1988. The appellant, being dissatisfied with the judgment, filed a notice of appeal on 21 October 1988. However, the notice was not served on the respondents until 25 October 1988.

Under O 54 r 2 of the Subordinate Courts Rules 1986 ('SCR'), a notice of appeal must be filed and served within 14 days from the date of judgment. Accordingly, the appellant was out of time by one day in so far as service of the notice on the respondents was concerned. The appellant applied by way of summons-in-chambers before the High Court for an order that 'the time for the service of the notice of appeal herein dated 21 October 1988 be extended to 25 October 1988'.

The application for extension of time was heard by the learned assistant registrar of the High Court. The respondents raised a preliminary point of jurisdiction. The submission was that this application for extension of time should be made to the subordinate court and not to the High Court. The assistant registrar did not accept this argument of the respondents and went on to grant an order to extend time as prayed for by the appellant. The respondents, being dissatisfied with the decision of the assistant registrar, has appealed to the judge-in-chambers and that is the matter now before me.

Mr Rai for the respondents reiterated his submission that the application to extend time should be made to the subordinate court and not to the High Court. He argued that until and unless the notice of appeal was filed and served, there was no appeal. Accordingly, there was no pending appeal before the High Court upon which the High Court could grant an extension of time. On the other hand, counsel for the appellant contended that there was in existence an appeal the moment the requisite notice of appeal was filed. In his submission, service on the respondents was not critical. He said the mere filing of the notice brought an appeal into being. If there were other irregularities, they fell within the jurisdiction of the appellate court and the appellate court would have the power to deal with them.

The subject of an appeal from a judgment or order of a subordinate court is governed by O 54 of the SCR. Rule 1(1) of that Order provides that an appeal to the High Court must be brought by notice of appeal. The prescribed form for the notice of appeal requires that the notice must be addressed to 'the Registrar, Subordinate Courts *and to*:'. This obviously means that it must be addressed to all the respondents who would be affected by the notice of appeal. This is further reinforced by r 1(5) which requires that the notice of appeal 'must be served on all parties to the proceedings ...'. Then there is r 2 which prescribes that every notice of appeal must be filed and served within 14 days of the judgment or order made.

The first issue which I am asked to address is: is there an appeal where the notice of appeal, though filed, was not served on the respondents within the prescribed time. In my opinion, in the light of the Rules referred to above, there cannot be any doubt that before there could be in existence an appeal, the notice of appeal must be both filed and served within the prescribed time. The meaning of appealing is 'giving notice to your adversary of your intention to appeal, by serving upon him a notice of appeal': see Jessel MR in *Ex parte Saffery*[1] at p 367.

I think I also find support in what I have just said from three Malaysian Federal Court cases: *Gurbachan Singh* v *Seagrott & Campbell*,[2] *Chong Kueng Ying* v *Lovis Lavagna*[3] and *Cheah Teong Tat* v *Ho Gee Seng*.[4]

In *Gurbachan Singh*,[2] the notice of appeal was filed within time but was served out of time. Applying the relevant Malaysian rules of court (the wording of which, though not identical to ours, but substantially to the same effect), the Federal Court held that an appeal could only be said to be brought when the notice of appeal was served on the respondents. Again in *Chong Kueng Ying*,[3] the notice of appeal was filed in time but served out of time. It is of interest to note that in that case the applicants did not ask for extension of time to serve the notice of appeal (though already filed) out of time; they asked for leave to appeal out of time which was refused.

Finally in *Cheah Teong Tat*,[4] which is a case where the notice of appeal against a session court's judgment was filed in time but was not served on the respondent, the appellant subsequently applied to the High Court for extension of time to serve the notice of appeal. I would, however, point out that no similar jurisdictional question whether the application for extension should or should not be made to the Malaysian High Court was raised by the respondent. There could have been a reason; or perhaps the answer lies in the relevant rules. But nothing appears from the report. I am citing this case for the majority decision of the Federal Court which held that the notice of appeal must both be filed in the court and served on the respondent. Gill CJ said at p 151:

> I do not think an appeal can come in existence without the notice of appeal being filed in court, as well as a copy of it being served on the respondent within the prescribed period.

Another point of interest in that case is that though the relevant Malaysian rules did not specifically provide the time within which the notice of appeal should be served on the respondent, the Federal Court nevertheless held that it must be served within 14 days, which was also the period within which the notice must be filed.

Reverting to the present application, since the notice of appeal was not served within time, there is accordingly no appeal in existence to the High Court.

Under O 3 r 5 of the SCR, the subordinate court is empowered to 'extend or abridge the period within which a person is required or authorized by these Rules ... to do any act in any proceedings'. In my opinion, the present application should have been made before the subordinate court in accordance with that Order.

There is nothing in the Rules of the Supreme Court 1970 ('RSC') which deals with the subject of appeal from the subordinate court to the High Court. This subject is regulated exclusively by O 54 of the SCR. Whenever reference to the High Court is necessary, O 54 has expressly done so, eg, rr 3(2), 5(2) and (3), 6(3) and 7(5). Counsel for the appellant had sought to argue that, based on r 3(2), which provides that 'the High Court may at any time ... order further security for costs to be given', the High Court automatically has jurisdiction over an appeal once the notice of appeal is filed. I am unable to accept this contention. Obviously, r 3(2) can only come into play if there is in existence an appeal.

I now turn to consider O 3 r 5 of the RSC. There the High Court is expressly empowered to 'extend or abridge the period within which a person is required ... *by these Rules* or by any judgment order or direction, to do any act in any proceedings.' The service of the notice of appeal within 14 days is not a requirement of the RSC but the SCR. Accordingly, O 3 r 5 of the RSC cannot apply.

I am conscious that under s 18(2)(h) of the Supreme Court of Judicature Act (Cap 322, 1985 Ed) (the 'Act'), the High Court is given a general power to 'enlarge or abridge the time prescribed by any written law for doing any act or taking any proceeding'. Further, under s 27(1) of the Act, the High Court is given general supervisory and revisionary jurisdiction over all subordinate courts. But in my view, the High Court should only intervene under such general powers if the circumstances of the case clearly warrant it and where there is no other just and convenient recourse available to the applicant. Here, O 3 r 5 of the SCR clearly provides that an application for extension of time could be made to the subordinate court. No reason has been given by the appellant why the application was not or could not be made before the subordinate court.

Further, as a matter of policy, I would discourage the taking up of a matter to the High Court if the same could just as effectively and conveniently be taken up in a subordinate court. This would only lead to the cluttering up of the High Court with matters which could and should be dealt with at the lower courts. It would also run counter to the objectives of the recent amendments to the Subordinate Courts Act (Cap 321, 1985 Ed), which enhanced the jurisdiction of the subordinate courts.

For all the above reasons, I take the view that the application for extension of time should not be made before the High Court. I would allow the appeal by the respondents and make no order on the application of the appellant, who may, if he so wishes, make a fresh application to the subordinate court. I have not heard any arguments on the merits of the application and I make no comments thereon. I would fix costs at $1,200 payable by the appellant to the respondents.

Appeal allowed.

Solicitors: *Ang & Partners; Niru & Co.*

Reported by *Terence Tan Bian Chye*